

Matter of: Ebon Research Systems

File: B-261403.2

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DIGEST

1. Agency's consideration of protester's in-house expertise in veterinary medicine was reasonable and in accordance with solicitation for animal husbandry services that provided for evaluation of corporate background resources such as "technical expertise in animal care," because such expertise is reasonably related to or encompassed by the stated criteria.

2. Awardee did not engage in "bait and switch" tactics where proposal clearly indicated that awardee intended to hire as many of the incumbent's personnel as possible if it received the contract, but advised the agency it was submitting the resumes of alternate personnel, which the agency reasonably evaluated, in case it was unable to hire incumbent personnel.

3. Protest that agency failed to evaluate the individuals proposed for senior technician positions, and improperly failed to downgrade the awardee's proposed senior technicians for failing to meet certification requirements is academic and has no practical consequence where the record shows that both proposals relied upon the same technicians and neither was downgraded in this area.

4. Challenge to agency's cost realism review is denied where the agency reasonably expressed concerns and upwardly adjusted the incumbent's proposed costs on the basis that its proposed wages were lower than those it currently provided to its employees; and took steps to ensure that sufficient costs were proposed for wage escalation over the life of the contract.

DECISION

Ebon Research Systems protests the award of a contract to The Bionetics Corporation under request for proposals (RFP) No. 223-95-2282, issued by the Food and Drug Administration (FDA) for animal husbandry services. Ebon, who was the incumbent contractor, argues that the agency improperly evaluated the technical and cost proposals, and irrationally selected Bionetics for award.

We deny the protest.

BACKGROUND

On January 11, 1995, the FDA issued the solicitation for a cost-plus-fixed-fee contract for animal husbandry services at the Beltsville Research Center in Maryland, for a 10-month base period, with two 1-year options. The solicitation advised offerors that the agency would give primary consideration to the evaluation of technical proposals, rather than proposed costs, with the importance of cost increasing with the degree of equality of technical proposals. The solicitation listed the evaluation factors, with their respective weights, as follows: understanding the statement of work, 40 percent; experience and qualifications, 40 percent; proposed plans, 10 percent; and quality control, 10 percent.

Five firms submitted proposals on February 21. The agency found three of these five proposals, including the ones from the protester and the awardee, technically acceptable and included them in the competitive range. The agency initiated discussions on April 14, holding face-to-face meetings on April 28, and receiving best and final offers (BAFO) on May 4. Although Ebon's evaluated costs of \$3,836,135 were lower than Bionetics evaluated costs of \$3,972,277, the agency considered Bionetics's technical proposal, which had a point score of 91.4 (as opposed to Ebon's score of 85.4), to be superior and selected Bionetics for award on May 10. This protest followed.

PROTESTER'S CONTENTIONS

Ebon essentially raises the following challenges to the agency's evaluation of technical proposals: (1) Ebon's proposal was improperly downgraded because its project director lacked experience in certain areas; (2) the FDA permitted the awardee to engage in "bait and switch" tactics in the area of proposed personnel; (3) the agency wrongly failed to rescore the offerors' BAFO submissions; and (4) the evaluators failed to consider the individuals proposed by the awardee under the category of senior

technicians. With respect to the evaluation of proposed costs, Ebon argues that the FDA performed an unreasonable cost evaluation and treated Ebon differently than it treated Bionetics.

ANALYSIS

In reviewing protests against an agency's evaluation of proposals, we review the record to determine whether the agency's judgments were reasonable and in accordance with the listed criteria, and whether there were any violations of procurement statutes or regulations. CTA, Inc., B-244475.2, Oct. 23, 1991, 91-2 CPD ¶ 360. Solicitations must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors set forth in the solicitation. Federal Acquisition Regulation §§ 15.605(d), 15.608 (FAC 90-29). While agencies are required to identify the major evaluation factors, they are not required to identify all areas of each factor which might be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229. Here the record shows that the evaluation of Ebon's proposal and selection of Bionetics for award were reasonable and consistent with the factors listed in the solicitation.

In its initial protest filings, Ebon focused its challenge on the agency's assessment of its proposed project director. Specifically, Ebon claims it was advised at the debriefing that it lost this competition primarily because its project director lacked training in laboratory animal medicine. Ebon argues that it was improper to downgrade Ebon's proposal based on the qualifications of its project director because there was no RFP requirement for a project director, and no provision for evaluating the candidate's qualifications. Instead, the RFP stated that the agency would consider the qualifications of two key personnel, the contract manager and alternate contract manager, under the evaluation factors of experience and qualifications.

The agency explains that it did not downgrade Ebon based simply on the project director's qualifications or lack thereof, but in the area of corporate experience. Under the experience and qualifications evaluation factor, the solicitation stated that the agency would evaluate corporate ability as indicated by corporate background resources such as "technical expertise in animal care." In this regard, and since this was a solicitation for animal husbandry services, the agency explains that evaluators considered whether corporate offerors had experience in veterinary medicine. Although Ebon's proposal noted the availability of consultants with veterinary experience, the proposal did

not tell how on-site support would be provided, considering that none of Ebon's existing corporate personnel had veterinary experience.

For this reason, the agency explains, it looked for evidence of veterinary experience elsewhere in Ebon's proposal. The contracting officer thought that the project director might have such experience and asked for information on this individual's background during discussions. When the information submitted with Ebon's BAFO did not show that the project director had veterinary experience, the evaluators' concern remained unresolved. Lack of veterinary experience was, according to the agency, a factor in Ebon's slightly lower score under the qualifications and experience evaluation factor.

Our review of the record supports Ebon's claim that its project director was an additional position, not required by the RFP, and that this individual was included to provide a communications link between Ebon's corporate management and the Ebon personnel who would perform the contract. Although Ebon complains that the agency should have more clearly identified any concern about this individual's qualifications during discussions, Ebon's contention misses the point. Since the concern involved corporate resources rather than individual experience, and since Ebon does not contest the evaluators' conclusion that there was no one in Ebon's corporate hierarchy with the desired experience, we fail to see how the agency's concern, or its alleged failure to raise its concern during discussions, was improper. Unless a solicitation advises otherwise, where experience that is not subject to change is a subject of agency concern, that concern need not be disclosed during discussions since the deficiency is not of a type that can be corrected. Sletten Construction Co., B-242615, May 24, 1991, 91-1 CPD ¶ 506. We find the agency's concern reasonable, and consistent with the evaluation scheme's stated interest in corporate resources related to expertise in animal care. The agency, by seeking more information on the project director's qualifications, simply took appropriate steps to allow Ebon an opportunity to dispel evaluators' concerns about the availability of such expertise.

Ebon next argues that Bionetics engaged in improper "bait and switch" tactics in this competition. Ebon claims, and the record shows, that after award Bionetics hired 30 of 34 incumbent Ebon personnel, including the contract manager and alternate contract manager. Thus, according to Ebon, Bionetics was improperly evaluated on the basis of proposed personnel it had no intention of hiring.

The agency denies that Bionetics engaged in a "bait and switch" maneuver because the awardee's proposal expressly stated that Bionetics intended to hire as many of the incumbent personnel as possible. Thus, the agency argues, Bionetics did not mislead the agency in any way about its preference for hiring the incumbent's personnel, rather than the personnel whose resumes it provided for evaluation purposes. According to the agency, the replacement of Bionetics's proposed personnel with the incumbent Ebon personnel was handled as a routine matter of contract administration.

While we share the concerns raised by Ebon about the wisdom of evaluating personnel who, ultimately, may be different from the personnel who actually perform the contract--see CBIS Federal Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308 (proposing to employ specific personnel that the offeror does not expect to actually use during the contract performance has an adverse effect on the integrity of the competitive procurement system)--we cannot conclude, given this particular record, that the agency's evaluation was improper.

First, we note that the agency was not misled in any way by Bionetics's approach. In this regard, Bionetics's proposal stated:

"[i]t is our desire to hire as many of the qualified incumbent personnel as possible. On other contracts where we have taken over from other contractors, we have been able to retain over 90% of the incumbent staff." Proposal at 158.

The record here shows that in hiring 30 of 34 of Ebon's former personnel, Bionetics achieved precisely the hiring level it mentioned in its proposal.

Second, we note that there was nothing improper about the agency's evaluation of Bionetics's proposed personnel, even though it was aware that, if possible, Bionetics would substitute incumbent Ebon personnel if awarded the contract. In this regard, we note that both Bionetics and the agency explain that the company had no access to Ebon personnel until after the selection decision. As a result, Bionetics had no ability to know how many of the Ebon personnel, or which personnel, would accept its offer of employment. Where, as here, there is no misrepresentation, and no evidence that the agency was wrongly lured into selecting an offeror it would not otherwise have selected, we will not overturn an otherwise reasonable selection decision. Harris Corp.; PRC Inc., B-247440.5; B-247440.6, Aug. 13, 1992, 92-2 CPD ¶ 171.

We also note that the record supports the agency's assertion that the evaluation of the two key resumes proposed by Bionetics was not decisive in the selection decision here. Specifically, the record shows that three of five evaluators rated the two proposals substantially equal under the factor of experience and qualifications. While two evaluators awarded higher scores to Bionetics's candidates for contract manager and alternate contract manager, this scoring was responsible for only a small portion of Bionetics's overall advantage.¹ In any event, Ebon places too much weight on manipulation of the individual evaluator scores. Numeric point scores are merely guides to intelligent decision-making; they do not mandate automatic selection of a particular proposal. Id.; Peterson Builders, Inc.--Recon., B-244614.2, Apr. 7, 1992, 92-1 CPD ¶ 349. Even if the point score differential for experience and qualifications is factored out of the final result, the record supports the agency's belief that Bionetics's remaining higher point score represents a real superiority in the technical proposal that provides a proper basis for the selection of the higher-cost offeror. In short, the record contains no basis for concluding that the resumes submitted by Bionetics had a decisive effect on the evaluation and selection decision.

Ebon also protests the agency's failure to rescore BAFOs. The record shows that the chairman of the evaluation committee reviewed the BAFOs and determined that there was no need to reevaluate the proposals. Ebon disagrees in two areas. First, Ebon claims that its proposal should have been rescored to reflect the information included in the resume submitted by Ebon's project director. The agency

¹The agency obtained consensus scores by averaging the scores given by the five evaluators. Since the five evaluators awarded Ebon 36, 26, 38, 34, and 30 points for experience and qualifications--164 points total--Ebon's consensus score for experience and qualifications was 32.8 points. The two evaluators scored Bionetics 13 points higher in experience and qualifications, worth 2.6 points in the consensus score. Further, the agency points out--and our review confirms--that some of the difference in scoring is attributable to corporate experience and qualifications rather than key personnel. In this regard, our review shows that there was, in fact, a perception among the evaluators that the corporate experience portion of Bionetics's proposal was superior to the corporate experience set forth for Ebon. Thus, some portion of the 2.6 point difference under this subfactor is clearly attributable to the difference in corporate experience, leading us to conclude that the difference related to key personnel ratings was, in fact, de minimis.

concluded, however, that the resume did not show the kind of corporate knowledge the evaluators hoped for. The second change Ebon claims required rescoring was Bionetics's substitution of a different individual as its proposed contract manager. In this regard, the record supports the agency's conclusion that the qualifications of the individual originally proposed as contract manager were essentially the same as those of the individual proposed in the BAFO. Therefore, we fail to see how Ebon would have benefitted from any rescoring.

Finally, Ebon argues that the agency failed to evaluate "senior technicians" as the evaluation scheme provided. While we need not set forth in detail the litany of confusion regarding the requirements for senior technicians and whether they were to be considered key personnel,² Ebon argues that the agency erred in not separately evaluating the individuals proposed as senior technicians--FDA explains that it looked at these non-key personnel positions as a pool. In our view, Ebon's contentions in this regard, even if correct, raise an academic issue that need not be resolved here.

As stated above, in preparing a proposal for this effort, Bionetics advised the agency of its intent to use incumbent personnel where possible. With respect to the position of laboratory animal technicians or LATs (the same as senior technicians, as clarified in amendment No. 0002), Bionetics identified "incumbent LATs", as its primary candidates in its proposal. In addition, the proposal indicated that "incumbent [Ebon] employees are assumed to have the . . . certifications required for their respective positions." The proposal also identified a pool of back-up LAT candidates and stated their certification levels.³ Ebon argues that the evaluation was unreasonable because some of the Ebon people included by reference in Bionetics's proposal--i.e., incumbent LATs--did not have the required certification, and because some of the backup candidates proposed by Bionetics also lacked the required certifications.

²The role of senior technicians in the evaluation scheme was the subject of clarification questions to the agency, which were answered in writing and incorporated into the solicitation by amendment No. 0002.

³The certifications at issue here are provided by the American Association for Laboratory Animal Science (AALAS), and include certification as a Laboratory Animal Technician (LAT), and Laboratory Animal Technologist (LATG).

We conclude that this issue is academic based on an overall review of how this issue factored into the evaluation. First, these individuals are not key personnel and were not any significant part of the evaluation. Second, since the primary approach of Bionetics was to use all of the incumbent LATs, this issue can provide no basis for differentiating between the two proposals. Ebon has not shown or suggested that its proposal was downgraded because these personnel lacked certain of the certifications; thus there is no basis to insist that Bionetics be downgraded for proposing the same personnel. Finally, regarding the Bionetics candidates, the agency states that absent any evidence of fraud, it had no reason not to accept the proposal's claims of certification at face value.⁴ For these reasons, we conclude that this issue has no practical consequence in this evaluation, and we will not consider it further. See East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.

Finally, Ebon questions the agency's evaluation of its proposed costs. The record shows that the agency had two major concerns with Ebon's costs. First, for several employee categories Ebon proposed salaries that were lower than those under its existing contract. Secondly, Ebon's proposal made inadequate provisions for increasing the salaries of Ebon's contract manager and alternate contract manager in the course of performance. While Ebon argues that the written record contains no evidence that the agency advised Ebon that it should propose current salaries, we note that Ebon did modify its BAFO to commit itself to pay its personnel in accordance with Department of Labor wage determinations. This supports the agency's assertion that it advised Ebon of this problem during the discussions; at the very least, it demonstrates that the agency led Ebon into the area of concern, which is all that is required. The Boeing Co., B-259255.5, May 15, 1995, 95-1 CPD ¶ 284. We also find nothing unreasonable about an agency's concerns regarding the willingness of an incumbent contractor's employees to continue to perform despite proposed salary

⁴Furthermore, the agency notes, the solicitation did not require certification as an LAT or LATG, only that the candidate be "certifiable." Several of Bionetics's candidates who did not have the required certifications are or were pursuing certification, and there was no reason to believe, at the time of evaluation, that they were not "certifiable."

cuts.⁵ Information Spectrum, Inc., B-256609.3; B-256609.5, Sept. 1, 1994, 94-2 CPD ¶ 251.

Ebon also questions whether the agency properly considered its proposal to cap the salaries of the contract manager and alternate contract manager. In addition to explaining its initial adjustments, the agency has recalculated Ebon's costs considering this salary cap and notes that there is no significant change in Ebon's estimated costs. Accordingly, there is nothing in the record to indicate that the agency failed to consider anything in its consideration of cost realism that would have had an impact on the selection decision, which, as was stated in the debriefing, was based on the technical superiority of Bionetics's proposal, not on a small difference in proposed costs.

The protest is denied.

\s\ Robert H. Hunter
for Robert P. Murphy
General Counsel

⁵For the record, we note that Ebon claims it was treated unfairly on the issue of incumbent salaries because Bionetics also proposed lower salaries for certain employee categories, while at the same time hoping to hire those employees. Our review shows that generally Ebon proposed lower overall rates than Bionetics--i.e., Bionetics proposed lower rates in five labor categories, while Ebon proposed lower rates in six labor categories; also, in three out of four categories where both offerors proposed lower rates, Ebon's rates were significantly lower than Bionetics's rates. This fact, combined with the fact that Bionetics may not have been able to hire Ebon's personnel leads us to conclude that it was not unreasonable to adjust Ebon's proposed costs, while not adjusting Bionetics's proposed costs. In any event, during the course of this protest the agency has reevaluated Ebon's proposed costs in a manner consistent with the protester's claims, and has concluded that it would continue to select Bionetics's superior proposal.